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# THE UTILITY AND FUTILITY OF INTERNATIONAL STANDARDS FOR CHILDREN IN CONFLICT WITH THE LAW: THE CASE OF ENGLAND

Kathryn Hollingsworth<sup>Ψ</sup>

## Keywords

International children's rights; juvenile justice; child-friendly justice; UN Convention on the Rights of the Child

Over the past 30 years, international instruments have emerged across a number of legal regimes that impose on States binding and non-binding obligations relating to children in conflict with the law (Hespel, Put and Rom, 2012). The rights-based standards contained in these measures cover all elements of youth justice from prevention to detention. Using England as an example, this chapter examines the utility *and* futility of international standards in affecting change in domestic youth justice systems and in providing legally enforceable remedies. I focus on two legal regimes: the United Nations ('UN') and the Council of Europe ('CoE').<sup>i</sup> Considered individually, neither system provides the perfect vehicle for securing the rights of children in conflict with the law. The UN has detailed, comprehensive and child-specific standards but an historically weak method of enforcement; the CoE has the European Court of Human Rights to which individuals can bring complaints for breach of the European Convention on Human Rights (ECHR), but this is a general rights treaty the substantive content of which is not tailored to children's interests.<sup>ii</sup> Both regimes have, however, recently sought to address their respective weaknesses: at the UN level, a system of individual complaint was adopted in 2014 (the Third Optional Protocol: 'OP3'); and in 2010, the CoE published child-friendly justice guidelines. This chapter considers both of these developments but the primary focus is on what Kilkelly (2001) has described as the 'best of both worlds': the use of UN standards to interpret the ECHR in order to secure legally enforceable *children's* rights.

## THE UNITED NATIONS AND THE RIGHTS OF CHILDREN IN CONFLICT WITH THE LAW

The most comprehensive source of international standards for children, both generally and for those in conflict with the law, is the UN and in particular the Convention on the Rights of the Child (CRC). The CRC was not the first international children's rights instrument but its emergence marked an important conceptual shift in the image of the child from object of concern to legal subject (Verhellen, 1992). Accordingly, the Convention includes many autonomy-based rights (including civil and political rights and rights of participation) as well as interests deriving from children's physical, developmental, economic, and legal dependencies: thus helping to 'mediate the tensions' (Cipriani, 2009) between the justice and welfare models of youth justice. Of the CRC's 54 Articles, two have specific relevance to children in conflict with the law. Article 37 prohibits cruel, inhuman and degrading treatment and punishment, specifically proscribing the death penalty and life imprisonment without parole. It also includes the child-specific requirement that detention should be used only as a last resort and for the shortest possible time. Article 40 sets out many of the procedural rights for minors. These go beyond the usual fair trial rights to also include the desirability of reintegration, diversion and non-custodial responses; the requirement to set a minimum age of criminal responsibility (MACR); protection of privacy; and the child's right to be supported by her parents and by legal or other assistance. All of the other substantive rights – for example to education, access to health care, parental contact - extend to (putative) child offenders but apart from the four general principles (best interests, the right to be heard, non-discrimination, and the right to life, survival and development) their utility remains largely under-explored in the criminal justice context.

The breadth of the CRC's content, together with its jurisdictional reach (all UN members except the USA have ratified or are in the process of ratification), underlie its strengths *and* its weaknesses: securing almost universal agreement from vastly different States for a legally-binding treaty that contains over 40 substantive provisions meant that, in order to be politically feasible, the rights were widely drafted (sometimes vague) and the enforcement mechanisms weak (Kilkelly, 1996: 117). However, neither of these shortcomings necessarily limits the Convention's utility. First, the CRC is supplemented by a range of ambitious, comprehensive, and detailed (non-binding) soft law measures that raise standards through their persuasive force, their use in advocacy and campaigning, and by aiding the interpretation of the Convention and other legally-binding instruments (see below). These include, in the context of juvenile justice, the Beijing Rules, the Havana Rules, and the Riyadh Guidelines and secondary sources that derive from the jurisprudence of the UN Committee on the Rights of the Child (hereafter, UN Committee).<sup>iii</sup> Soft law fleshes out the Convention, providing detailed requirements such as a MACR over the age of 12 (UN Committee, 2007: para 32) and consent prior to the use of diversion (Beijing Rules, 1985: rule 11.3). Second, enforcement of the CRC has been strengthened by two developments: the adoption of OP3 and the Convention's use as an aid to interpretation by domestic and regional courts. Initially, monitoring and enforcement of the CRC was limited to a five-yearly periodic reporting process, overseen by the UN Committee. The concluding observations of the Committee that follow each report contain non-binding recommendations, compliance with which depends on diplomacy and political pressure rather than legal sanction (Kilkelly, 1996, 2001; Woll, 2000). Through this process the UK has been criticised (in relation to England) for its MACR, high custody figures (especially remand), the use of adult courts, inadequate protection of privacy, and conditions in detention. Subsequent reforms to law, policy and practice have addressed some of the Committee's recommendations (HM Government, 2014) but compliance has been piecemeal.

On issues about which the Government is resolute, or which would be politically unpopular – for example the MACR or anti-social behaviour measures - the monitoring process can appear futile. Further, even where the Government *has* reported progress on its compliance with previous recommendations, this has usually been partial (thus appearing tokenistic<sup>iv</sup>) and/or attributable to other factors.<sup>v</sup> Nonetheless, although non-binding, concluding observations play an important role within domestic political accountability processes (House of Lords House of Commons Joint Committee on Human Rights, 2014) and – as the UN Committee’s jurisprudence - provide the definitive interpretation of the CRC (Hespe, Put and Rom, 2012). Though infrequent, there are examples of the English courts giving indirect legal effect to concluding observations with which the Government had previously failed to comply.<sup>vi</sup> However, the ability of the courts to do so is highly circumscribed (see below).

As noted above, the CRC’s enforcement mechanisms have been strengthened by the adoption in 2012 of OP3. The Protocol brings the CRC into line with all the other UN human rights treaties by (*inter alia*) introducing a system of individual complaints for alleged infringements of children’s rights. Buck and Wabwire (2013) suggest that OP3 has two key benefits. First, it fills an institutional gap by providing a child-specific complaints mechanism which represents ‘an emblem of relevant values, norms and principles that prompts awareness of children’s rights’ that can ‘drive states to review and reform their domestic human rights policies and practices’ (Buck and Wabwire, 2013: 226). Second, it reduces the knowledge gap by providing a concrete and context-specific arena for the development of the UN Committee’s jurisprudence. However, OP3 has been criticised for failing to include a collective complaints process (Grover, 2015) and for being insufficiently ‘child-friendly’, with little to differentiate it from the complaints processes of other human rights treaties (Egan, 2014). Furthermore, complaints can only be made against States that have ratified the Protocol itself (Article 1(3)).

The UK has not ratified and is unlikely to do so soon (House of Lords House of Commons Joint Committee on Human Rights, 2014: para 35). Therefore, for children in England and Wales the utility of OP3 is indirect only, via its contribution to the Committee's jurisprudence (which domestic and intra-national courts may draw on).

## CHILD FRIENDLY JUSTICE IN THE COUNCIL OF EUROPE

In 2012, the Council of Europe published its Strategy for the Rights of the Child, designed to achieve 'effective implementation of existing children's rights standards (Committee of Ministers of the Council of Europe, 2012). As part of the predecessor programme to the Strategy (Building a Europe for and with Children programme) the Guidelines on Child Friendly Justice were produced (Committee of Ministers of the Council of Europe, 2010: hereafter 'Guidelines'). The Guidelines do not create *new* standards; rather they collate international rights to provide practical guidance for member states to design their judicial and non-judicial systems in a child-specific way. The Guidelines emphasise general norms including dignity and the rule of law (due process, presumption of innocence, legality, proportionality, the right to a fair trial and so on), and child-specific principles drawn from the CRC (participation, best interests and non-discrimination). The more specific standards broadly replicate UN measures; however, the involvement of children and young people in the drafting process led to greater emphasis on confidentiality, the importance of support from family and friends, the provision of feedback on decisions, the right to gain access to independent support and complaint mechanisms, and the right to be informed and heard (Kilkelly, 2010a: 40). As a non-binding instrument, the effectiveness of the Guidelines depends on political commitment, professional awareness, and their value as a judicial interpretative tool. The European Union has committed to taking the guidelines into account in future legal instruments, but lack of awareness amongst professionals in the UK (judges,

police, lawyers, and social workers) diminishes their utility (European Union Agency for Fundamental Rights, 2015). Thus, along with other European soft law (including Council of Ministers recommendations<sup>vii</sup>) and UN standards, the guidelines might prove most useful if they can acquire indirect legal effect through the ECHR; however, this has not happened in any significant way to date.

## GIVING (INDIRECT) LEGAL EFFECT TO INTERNATIONAL STANDARDS: THE ECHR AND THE COURTS

Even without direct incorporation into domestic law, international standards can be used in litigation to secure immediate advances in children's rights by providing the basis for legally-binding remedies for individual or groups of children and, when used strategically, systemic change (Kilkelly, 2010b: 247). For children in England, it is the ECHR, enforced by the ECtHR and given domestic legal effect by the Human Rights Act 1998 (HRA), that has provided the primary vehicle for the development of child-specific rights informed by other, non-enforceable measures. This is possible, says Kilkelly (2001: 313) because the ECHR is broadly drafted (which allows for imaginative interpretation) and because it is a 'living instrument . . . which must be interpreted in the light of present-day conditions' (*Tyrer v UK*), which for children includes taking account of developing international standards. In the field of juvenile justice, it is standards deriving from the CRC that have been most influential, primarily because of its specificity and the consensus indicated by its almost universal ratification (Forowitz, 2010). This has led Kilkelly to suggest this is the 'best of both worlds', combining 'the child-specific provisions of the CRC with the ECHR's effective system of individual petition in order to maximise the potential of both instruments to advance children's rights' (Kilkelly, 2015).

## The European Court of Human Rights

The ECtHR has considered complaints relating to various aspects of the youth justice system in England: the MACR (*V v United Kingdom*); trial procedures in the Crown Court (*V v United Kingdom* and *SC v United Kingdom*); sentencing (*Hussain v United Kingdom*; *V v United Kingdom*; *Bailey v United Kingdom*); procedural protections for out of court disposals (*R v United Kingdom*); retention of DNA samples and fingerprints following acquittal (*S and Marper v United Kingdom*); and the placement of vulnerable children in young offender institutions (*Bailey v United Kingdom*). In most, though not all of these cases, the Court drew on UN standards. The applicant children were at least partially successful in four of the decisions (*Hussain*, *V*, *SC* and *S*<sup>viii</sup>) and legal and policy changes have subsequently been made to the sentence of detention during Her Majesty's pleasure (to allow periodic review and to remove the power of the Secretary of State to set the tariff period); to Crown Court procedures in order to secure effective participation and limit the child's intimidation, humiliation, or distress (see Practice Direction 2/11); and to the retention of DNA of child suspects (see Protection of Freedoms Act 2012).

However, the ECtHR is *not* a de facto CRC court. It has its own political, jurisdictional and operational boundaries which limit its capacity to give effect to other international norms: its authority and legitimacy – and thus the likelihood of Member States complying with its pronouncements – depends on it remaining within those boundaries (McInerney-Lankford, 2012). Therefore, although children's rights is an area where the ECtHR has been receptive to international law (Forowicz, 2010), the Court nonetheless operates under a number of constraints.

The first constraint relates to the ECHR's substantive content: the ECtHR 'will not stretch an existing European Convention right to meet the global standard if it means creating a new right' (van Bueren, 2007: 19). In *R v United Kingdom*, for example, the ECtHR held that Article 6



did not apply to pre-charge diversion when a 14 year-old boy received a final warning (caution) for a sexual offence, which had resulted in his placement on the sex offender's register. Without Article 6 there was no vehicle for the boy to argue that his consent to the warning was required, as per the Beijing Rules (Hollingsworth, 2007).

The second limitation relates to the Court's role within the constitutional structure of the CoE, and its need to balance the development of common standards with the legitimate diversity that exists across Member States in *how* to protect those rights. The ECtHR has adopted the 'margin of appreciation' doctrine as the means of deferring to States in circumstances where they have special knowledge, particularly when there is no European consensus on the issue. McInerney-Lankford has noted that the doctrine 'operates indirectly to restrict the Court's freedom to consider other sources of international law, by restricting the Court from moving beyond the consensus binding Contracting States or exceeding its jurisdictional mandate' (2012: 613). The setting of a MACR is one area where there is little consensus and in some countries – the UK included – it is highly politicised. Unsurprisingly then, in *V v United Kingdom* the ECtHR rejected the Article 3 claim that holding criminally to account for murder two boys aged 10 constituted degrading and inhuman treatment. At the time, the relevant international norm required only that a MACR be set (Article 40(3)(a) CRC), and that it not be too low, bearing in mind the facts of emotional, mental and intellectual maturity (Beijing Rule 4.1); and, although the UN Committee had earlier recommended that the MACR in England be raised, it had not specified to what age (UN Committee on the Rights of the Child, 1995). Since this decision, the UN Committee has stated that a MACR below the age of 12 is internationally unacceptable (UN Committee on the Rights of the Child, 2007). However, given that the more recent, more geographically-specific, child friendly justice guidelines<sup>ix</sup> replicate the vaguer Beijing Rules, the ECtHR is unlikely to regard the UN Committee's statement as the most authoritative indication of *European* consensus (Hespel, Rom and Put, 2012: 353). This points

to a larger problem with the proliferation of international norms for juvenile justice emerging from different legal regimes: they can ‘overlap, place different emphasis on different aspects and, at worst, contradict each other’ (Hespel, Rom and Put, 2012: 337). Although ‘non-regression’ (or ‘savings’) clauses are included in most rights instruments (that is, that where higher standards exist in international or domestic law they should apply), the fragmentation of international law (Koskenniemi and Leino, 2002) can result in ‘textual variation, or even inconsistency, [which] weakens the authority of all and creates incoherence’ (Chinkin, 2003: 28). The child friendly justice guidelines may therefore stymie (eg with regards to the MACR or privacy<sup>x</sup>), as well as improve<sup>xi</sup>, the development by the ECtHR of children’s rights in juvenile justice.

The final point to make here is that where children in conflict with the law in England have been successful in their claims before the ECtHR, the Government’s response has been *just* sufficient to comply with the Court’s decision (thus acquiring legitimacy for those actions) but falls short of full compliance with international standards. This is perhaps most obvious in relation to the remedial action taken after *S v United Kingdom* where, in response to the finding that the blanket retention of suspected/offenders’ DNA is unlawful, the Protection of Freedoms Act 2012 nonetheless still allows the DNA of children convicted of more than one minor offence to be kept indefinitely (House of Lords House of Commons Joint Committee on Human Rights, 2011: para 61ff). The UN Committee also continues to criticise the use of adult Crown Courts for children despite the practice direction introduced following *V v United Kingdom* which attempted to make them more child-friendly. We might, therefore, agree with van Bueren that it is an ‘overgeneralisation to say that the use of the UN convention by the ECtHR is ‘the best of both worlds’’ (2007: 23).

### International Standards in the English Courts

The English courts adopt the approach of their Strasbourg colleagues and interpret ECHR rights

– given domestic legal effect by the HRA – using the CRC and associated soft law. But, within juvenile justice, as in other contexts, engagement with international children’s rights varies (Tobin, 2009). In some cases, and for some judges, the CRC is invisible (no reference is made<sup>xiii</sup>); in others it is marginal (it is referred to but forms no real part of the reasoning; it may be dismissed as not relevant or it is used merely to assert that domestic law is compatible<sup>xiii</sup>); at times a superficial approach is adopted (the CRC features in the reasoning but the analysis is superficial<sup>xiv</sup>); but elsewhere, judges have adopted a ‘substantive approach’ (conceptualising issues, adopting procedures, interpreting content, or reasoning in a way compatible with children’s rights (Tobin, 2009)).<sup>xv</sup> It is beyond the scope of this chapter to survey all of the English case law. Instead, two cases are discussed to exemplify the ways in which the English courts have, and have not, used the CRC.

*R (HC) v Secretary of State for the Home Department* is an exemplar of judicial engagement with international juvenile justice standards. The case concerned the child-specific rights available when children are arrested, detained and questioned by the police (namely the right to an appropriate adult and parental notification of arrest) and which extended only to those aged 16 and under. A claim was therefore brought by a 17 year-old boy that Article 8 and Article 6 ECHR, interpreted in line with the CRC (including the definition in Article 1 of a child as a person under 18), had been breached. Interestingly, the Court did not base its decision on Article 6, as one might expect in a case concerning procedural rights of suspects, but on Article 8. One reason for this was that it allowed the High Court to follow the precedent of the Supreme Court in *ZH (Tanzania)* and elevate the child’s best interests to a ‘primary consideration’ when determining whether a restriction of Article 8 was proportionate. In assessing this, the Court held that since children (i.e 17 year-olds) were treated in the same way as adults, their best interests could not have been a primary consideration: hence, the decision

was unlawful. The emphasis in *HC* on the child's best interests, needs, vulnerabilities, and on his familial relationships as the source of his rights when in police detention conveys an important message about the way in which children in conflict with the law are socially – and legally – constructed, challenging the pervasive negative images of (putative) child offenders that, in England, have been dominant since the 1990s. However, as I have noted elsewhere (Hollingsworth, 2014: 91), the specific content of children's procedural rights in police detention was left legally undefined, and so the possibility remains that legislation could be passed that limits the child suspect's rights but which, provided children are treated differently from adults, would nonetheless be compatible with the ostensibly 'substantive' children's rights approach in *HC*.

The second example, *R (JC) v Central Criminal Court*, examined the statutory provisions that restrict media reporting of Crown Court cases involving child defendants. The legal framework is broadly compliant with international children's rights norms<sup>xvi</sup> that privacy be fully respected at all stages of the proceedings (Article 40(2)(vii) UNCRC; Beijing Rules, Rule 8<sup>xvii</sup>). However, in *JC* the Court of Appeal held that reporting restrictions expire upon the child's 18<sup>th</sup> birthday, reasoning that the terms 'child or young person' used in the statute unambiguously fixed their temporal reach and that the purpose of the statute was to protect children not the adults they become. Further, since this issue concerned the interests of *adults* (ie those convicted as a child but now over 18) the CRC was afforded little significance (para 31). One thing this case illustrates is the need for a coherent normative and theoretical basis for the rights of children in conflict with the law, against which the scope and purpose of international standards, including the CRC, can be better articulated. Elsewhere I have suggested that a rights-based youth justice system is one that is consistent with the child's autonomy: not only her autonomy in the present (the child as 'being'), but also her capacity for autonomy as a

future adult (the child as ‘becoming’), protected by a class of rights I call ‘foundational rights’ (Hollingsworth, 2013). Foundational rights help to ensure that the child’s capacity for autonomy *as an adult* is not permanently harmed by her childhood offending. Applied to the issue of reporting restrictions, it is clear that lifelong anonymity is not about protecting the rights of *adults*, but about protecting the *child’s* capacity for future autonomy. The rights of the child as a future adult are not inseparable from her rights during childhood and as such, the CRC *should* apply, including (the rather weak) obligation towards children’s reintegration in Article 40(1). It is this, as well as the child’s welfare and participation during trial, which underpins the child’s rights to privacy in criminal proceedings and which is secured by *lifelong* reporting restrictions.

### Concluding comments

International children’s rights measures provide a detailed, comprehensive framework that can be, and have been, used to improve the treatment of children in conflict with the law in England. Despite the weaknesses in child-rights specific enforcement mechanisms, international standards have been used to secure systemic change as well as remedies for individual children when used in litigation as an interpretative aid for the ECHR. However, this is not a panacea. As the discussion above has shown, the ECHR cannot provide a vehicle for all international standards; at times the judiciary use the norms superficially; the lack of a clear normative basis can limit the scope of the rights in litigation, and the Government’s response is usually only *just* enough to secure compliance and shows little overall commitment to children’s rights. The introduction of OP3 may also have the unintended consequence of causing a diminution in the child-specific jurisprudence of the ECtHR should children from OP3-ratifying European states take their complaints instead to the UN Committee. This could have a detrimental effect on

English children whose Government is unlikely to ratify and who must, therefore, rely on the ECtHR's jurisprudence as the source of their rights domestically and internationally.

However, by far the greatest limitation of the ECHR as the vehicle for English children's rights is the threat of repeal of the HRA, as proposed by the Conservative Party. Should this happen, the ECHR will no longer be domestically enforceable, and the 'hook' for CRC rights will be lost. The children's Convention will not, however, lose all domestic application. As with any international human rights treaty, the CRC can be used to interpret ambiguous legislation and to develop the common law. However, the utility of the CRC in statutory interpretation is limited only to *ambiguous* legislation and, following a line of juvenile justice-related cases, only to legislation passed *after* UK ratification in 1991 (see again *JC*; and *R (T) v Secretary of State for Justice*). The CRC cannot, therefore, be used to interpret the Children and Young Persons Act 1933 and the Police and Criminal Evidence Act 1984, both of which contain provisions that are vital for children in conflict with the law. The common law holds more promise and the courts have used the CRC to develop judicial review principles for example to require adult assistance for children in parole hearings (*R (K) v Parole Board*). There are also indications that the judiciary are embedding rights in the common law rather than using the ECHR, in anticipation of HRA repeal (*R (Osborn) v Parole Board*). But none of this is sufficient to provide a child-friendly criminal justice system, one that complies fully with international standards. For that to occur, the starting point has to be domestic incorporation of the CRC.

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<sup>i</sup> Space precludes an examination of the European Union, but – provided the UK retains its membership – it provides an important source of rights for children (see eg Article 24 of the Charter of Fundamental Rights of the European Union and Stalford, 2012), that in the criminal justice system are strengthened by the proposed Directive of the European Parliament and the Council on procedural safeguards for children suspected or accused in criminal proceedings (COM (2013) 822 final). The directive draws on the UN standards discussed below (Stalford, 2015), and when implemented will oblige domestic compliance.

<sup>ii</sup> Other relevant CoE treaties include the European Social Charter (for children's socio-economic) rights (Kilkelly, 2015; see especially articles 7 and 17) and the European Convention on the Exercise of Children's Rights. These have featured less as a source of rights for children in conflict with the law and thus, again, space precludes its full consideration.

<sup>iii</sup> Namely, General Comments (especially General Comment No 10) and concluding observations.

<sup>iv</sup> For example, 17 year-olds were removed from the adult system of remand ostensibly to comply with the UN Committee's requirement (UN Committee, 2002) that there be a separate system of criminal justice for children (see Ministry of Justice, 2011) yet the same Government refused to extend to 17 year-olds in police detention the same rights enjoyed by all other children until it was forced to do so by a legal challenge (*R (HC) v Secretary of State for the Home Department*; see further Hollingsworth, 2014).

<sup>v</sup> For example, the drop in child custody figures since 2009 are as much due to changes in managerial practices in the police which have reduced first time entrants into the youth justice system as they are any commitment to children's rights (Allen, 2011).

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<sup>vi</sup> In *HC* (above n iv).

<sup>vii</sup> See also Recommendations of the Council of Ministers on the European Rules for Juvenile Offenders Subject to Sanctions or Measures; and New Ways of Dealing with Juvenile Delinquency and the Role of Juvenile Justice.

<sup>viii</sup> In *V v United Kingdom* (conjoined with *T v United Kingdom*), only the Article 6 claim (right to participate effectively in one's trial) was successful.

<sup>ix</sup> As well as the EU proposed directive, above n i.

<sup>x</sup> See b

elow n xvii.

<sup>xi</sup> The guidelines have higher standards, for example, in relation to the requirement for specially trained lawyers: Rap, 2013.

<sup>xii</sup> eg *R (W) v Commissioner of Police for the Metropolis* (curfew powers).

<sup>xiii</sup> eg *D v Chief Constable of Merseyside* (strip searching of a vulnerable 14 year old girl in the police station); *R (Y) v Aylesbury Crown Court* (reporting restrictions).

<sup>xiv</sup> Eg *R (SR) v Nottingham Magistrates Court* (discrimination between boys and girls vis a vis remand).

<sup>xv</sup> Eg *R (R) v Durham Constabulary* (diversion); *R (C) v Secretary of State for Justice* (restraint in secure accommodation); *R (HC) v Secretary of State for the Home Department* (rights of 17 year-olds in police stations).

<sup>xvi</sup> Courts have a *duty* to impose reporting restrictions in the youth court (which can be lifted in the public interest), and *discretion* to do so when children appear as defendants in the (adult) Crown Court (Children and Young Persons Act 1933 (CYPAs), s 49 and Youth Justice and Criminal Evidence Act 1999 (YJCE), s 45 respectively).

<sup>xvii</sup> The guidelines on child friendly justice are weaker, and require only that: 'The privacy and personal data of children who are or have been involved in judicial or non-judicial proceedings and other interventions should be protected in accordance with national law. This generally implies that no information or personal data may be made available or published, particularly in the media, which could reveal or indirectly enable the disclosure of the child's identity . . . '.